No. 72-1061

In the Supreme Court of the United States

OCTOBER TERM, 1972

WINDWARD SHIPPING (LONDON) LIMITED, ET AL.,
PETITIONERS,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICAL DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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This memorandum is filed in response to the Court's order of March 26, 1973, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

The vessels *Northwind* and *Theomana* are ships of Liberian registry, which carry cargo between United States and foreign ports. The crews and officers of the vessels are foreign nationals. (Pet. App. B1-B2.) The wages and other terms and conditions of employment of the crew are covered by contracts with the Pan Hellenic Seamen's Federation, the Indonesia Seafarers, and the Sierra Leone Seamen's Union (Pet. 5).

In October 1971, while both vessels were docked at the Port of Houston, Texas, for the purpose of loading and unloading cargo, six American maritime unions, acting in concert, established picket lines in front of the vessels. There were four pickets at each vessel, carrying signs which read (Pet. App. B2):

ATTENTION TO THE PUBLIC
THE WAGES AND BENEFITS PAID SEAMEN
ABOARD THE VESSEL THEOMANA [NORTHWIND]
ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN.
THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE
STANDARDS AND LOSS OF OUR JOBS.
PLEASE DO NOT PATRONIZE THIS VESSEL.
HELP THE AMERICAN SEAMEN.
WE HAVE NO DISPUTE WITH ANY OTHER VESSEL
ON THIS SITE.

[Printed names of the six unions]

The pickets did not speak to anyone. When inquiry was made of them, they handed out literature which read (Pet. App. B2-B3):

TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer

> American flag ships there are, the weaker our position will be in a period of national emergency.
>
> PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> Our dispute here is limited to the vessel picketed at this site, the SS [name of vessel added].

There was no labor dispute between the owners of the vessels and their crews or the foreign unions representing them while the picketing took place. The picketing unions neither claimed, nor sought, the right, to represent the foreign crewmen, and none of the crewmen was a member of these unions. The picketing was wholly peaceful. (Pet. App. B2.) As a result of the picketing, longshoremen and other workmen refused to service the vessels (Pet. App. B3).

The owner of the *Theomana* filed a charge with the Regional Office of the National Labor Relations Board in Houston, alleging that the unions had engaged in secondary picketing in violation of Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b)(4)(B); the charge was subsequently withdrawn (Pet. 10, n. 3). The owners of both vessels brought the present suit in a Texas state court, seeking an injunction against the picketing on the ground that it was for the purpose of inducing the owners to break their contracts with their crews and the foreign unions representing them and thus was tortious under Texas law (Pet. App. B3-B4). The trial court dismissed the

suit on the ground that "the issues raised * * * are arguably within the jurisdiction of the National Labor Relations Board and that for such reason are pre-empted by the Board and this Court is without jurisdiction to proceed further" (Pet. App. A2).

The Court of Civil Appeals for the Fourteenth Judicial District of Texas affirmed. The court found that the unions' picketing was a protest directed to "allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships" (Pet. App. B12-B13). The court further found that, as with the similar union activity in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, the unions' basic interest was "'in preserving job opportunities for [their members] in this country,'" and not in regulating "the 'internal economy' of the foreign vessel" (Pet. App. B9). Accordingly, the court concluded that *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, and *Incres Steamship Company* v. *Int'l Maritime Workers Union*, 372 U.S. 24 (discussed, *infra*, pp. 6-8), were inapposite, since in those cases the American unions were seeking to interfere with "the internal order, discipline and affairs of a foreign ship" (Pet. App. B12).

The Court of Civil Appeals, applying the pre-emption principles of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, held that the picketing here was, "at least arguably, a protected activity under section 7 of the [NLRA]. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB." (Pet. App. B13.)[1]

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[1]The court found that, since the picketing complied with the Board's *Moore Dry Dock* standards, 92 NLRB 547, it was not secondary activity proscribed by Section 8(b)(4)(B) of the National Labor Relations Act (Pet. App. B5-B6).

The Supreme Court of Texas denied the shipowners' application for a writ of error, finding "no error requiring reversal of the judgment of the Court of Civil Appeals" (Pet. App. D1).[2]

DISCUSSION

1. This Court has held that the jurisdiction of the National Labor Relations Board is exclusive and preemptive as to activities which are "arguably" protected under Section 7, or "arguably" prohibited under Section 8, of the National Labor Relations Act. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245; *Int'l Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200; *Amalgamated Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 284, 293. The state court here found that the unions picketed the foreign flag ships, not to organize or to represent their foreign crewmen, but merely to inform the public that those crewmen were being paid substandard wages which were jeopardizing the work opportunities of American seamen. If the substandard wages protested by the unions had been paid by an American flag ship to its crewmen, or by a foreign flag ship to American

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[2]Two federal district courts, in cases removed from state courts, have also held that similar picketing in other ports, arising out of the same campaign by the unions against foreign flag ships, is preempted by the National Labor Relations Act. *Mountain Navigation Co.* v. *Seafarers' Int'l Union*, 348 F. Supp. 1298 (W.D. Wis.); *Manners Navigation Co.* v. *Seafarers*, 82 LRRM 2433 (D. Minn.), decided June 8, 1972. In addition, the United States Court of Appeals for the Fifth Circuit has affirmed the dismissal of a federal district court suit brought by the Houston Port Authority to enjoin the picketing in that port, on the ground that the Norris-LaGuardia Act, 29 U.S.C. 101-115, precluded such relief. *Port of Houston Authority* v. *Int'l Organization of Masters, Mates, and Pilots*, 456 F. 2d 50, certiorari denied, 409 U.S. 894.

workers hired to load or unload the ship, such "area standards" picketing would be arguably protected by Section 7 of, and thus preempted by, the National Labor Relations Act. See *Houston Bldg. & Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321; *Int'l Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195. The basic question here is whether a different conclusion is required because the substandard wages protested are paid by a foreign flag ship to foreign nationals who are working under contracts negotiated with foreign unions.[3] The answer to this question turns upon an analysis of the following decisions.

2. In *McCulloch* and *Incres, supra*, this Court held that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6)" of the National Labor Relations Act. *Incres*, 372 U.S. at 27. The Act was also held to be

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[3]In *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, the Board held that picketing of the primary employer at a location—such as a dock—where other neutral employers are engaged in business operations is secondary and thus violates Section 8(b)(4)(B) of the Act, unless it meets the following conditions (at 549):

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *

The state court found that the picketing here satisfied the *Moore Dry Dock* criteria (note 1, *supra*). However, the Board, if the issue were presented to it, might find and evaluate the facts differently. To this extent, the picketing, if not protected by Section 7, may be prohibited by Section 8(b)(4)(B) of the Act.

inapplicable to the labor dispute in *Benz, supra.* However, as the Court noted in *Ariadne,* 397 U.S. at 198-199:

> This construction of the statute * * * was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel, an intervention thought likely to "raise considerable disturbance not only in the field of maritime law but in our international relations as well." *McCulloch,* 372 U.S., at 19.
>
> In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable conditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. In *McCulloch* an American seamen's union petitioned for a representation election among the foreign crew members of a Honduran-flag vessel who were already represented by a Honduran union, certified under Honduran labor law. Again, in *Incres* the picketing was by an American union formed "for the primary purpose of organizing foreign seamen on foreign-flag ships." 372 U.S., at 25-26. In these cases, we concluded that, since the Act primarily concerns strife between American employers and employees, we could reasonably expect Congress to have stated expressly any intention to include within its coverage disputes between foreign ships and their foreign crews. * * *

In *Ariadne* itself, on the other hand, the Court held that picketing to protest the wages paid to

American longshoremen who were employed by foreign vessels to handle their cargo was governed by the National Labor Relations Act. The Court reasoned (397 U.S. at 200):

> The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' "internal discipline and order." Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. * * *[4]

3. The situation here is closer to *Ariadne* than it is to *Benz, McCulloch,* and *Incres.* The unions are not seeking to represent or organize the foreign seamen employed on the foreign flag ships, nor are they seeking to help them in a dispute which they have with their employer. As in *Ariadne,* the unions' only concern is with the employment conditions of American workingmen, *i.e.,* they desire to protect the wages of American seamen from being eroded as a result of the lower wage rates allegedly paid by the foreign vessels. They have not sought to negotiate a contract with the foreign shipowners which would raise the wages they are paying to their foreign crews. They have merely appealed to members of the American public not to patronize the foreign vessels, and to American longshoremen and other workers not to service them.

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[4]The Court "put to one side situations in which the longshore work, although involving activities on an American dock, is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles." *Ariadne,* 397 U.S. at 199, n. 4.

This pressure, if successful, may either drive the foreign vessels out of business or cause them to raise their wage rates and other employee benefits to the American scale—and, in this sense, the picketing would have an impact on the internal economy of the vessel. However, this impact is an incident of seeking to protect a legitimate American interest (*i.e.*, the employment opportunities of American seamen), and not, as in *Benz*, *McCulloch*, and *Incres*, the result of a direct effort to negotiate for the foreign seamen, or to aid them in a dispute with the foreign shipowners.[5] Under those decisions, it is only the latter type of involvement in the labor relations of a foreign ship—which presents a real danger of conflicts with the law of the flag state—to which the National Labor Relations Act does not apply.

This conclusion is supported by *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365. There the Court, in holding that the Norris-LaGuardia Act precluded a federal court from enjoining "area

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[5]As the unions have stated, their "protest picketing activities is the antithesis of seeking representation rights for the foreign seamen or support thereof. Respondents are requesting that the foreign vessels and their crews be economically ostracized—don't patronize—help American seamen maintain their job opportunities here in the United States" (Br. in Opp., 17-18). Nor is a different conclusion required by the testimony of union representatives that it was to the unions' interest to get the foreign ship owners to increase the wages and working conditions of their crews, so that the American operators could become more competitive with them (Pet. 19; Transcript, pp. 158, 190). That the unions may have expected or even hoped that this would be a possible result of their picketing, does not establish that they intended to achieve that objective through contract or other direct negotiations with the foreign shipowners. Cf. *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 673.

standards" picketing of a foreign flag ship, stated (at 371, n. 12):

> Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic. * * *[6]

CONCLUSION

For these reasons, the court below correctly concluded that the picketing in this case was arguably subject to regulation under the National Labor Relations Act, and that under the preemption principles outlined above (p. 5) the complaint should be dis-

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[6]The Court in *Marine Cooks* was resolving only the issue of whether such picketing arose out of a "labor dispute" under the Norris-LaGuardia Act. As the Court later stated in *McCulloch*, "the application of the Norris-LaGuardia Act 'to curtail and regulate the jurisdiction of courts' differs from the application of the Taft-Hartley Act 'to regulate the conduct of people engaged in labor disputes'" (372 U.S. at 18). However, the fact that the National Labor Relations Act, rather than the Norris-LaGuardia Act, is involved here does not convert a domestic dispute into one which affects the internal economy of a foreign ship.

missed for lack of subject matter jurisdiction. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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